UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 839

Case No. 919: NOYEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 6 May 1996, Gerardus A. Noyen, a former staff member of the United Nations, filed an application requesting the Tribunal to:

"1. Decide that since the Appellant had been employed by the United Nations for twenty-one (21) years on a full time basis and was already fifty-eight (58) years old he had a reasonable expectancy of continued employment within the United Nations Organization, at least until the age of sixty (60).

2. Decide that the separation of the Appellant was immoral and inhumane, and at variance with standard labour relations practice in the developed world.

3. Decide that the Respondent made no effort to identify alternative employment for the Appellant within the United Nations Organization.

...

6. Decide that the Appellant be exempted from Staff Rule Annex III, Termination indemnity, paragraph (d), which states: 'No indemnity will be made to a staff member who is retired under the Regulations of the United Nations Joint Staff Pension Fund.'

7. Order the Respondent to pay the Appellant's salary and New York post adjustment for the period of 1 April 1994 - 3 September 1995."

Whereas the Respondent filed his answer on 5 July 1996;

Whereas the Applicant filed written observations on 3 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 July 1973, as a Special Technical Advisor in drilling technology in the Department of Economic and Social Affairs, now part of the Department for Development Support and Management Services (DDSMS), on a two year intermediate-term appointment, under the 200 Series of the Staff Rules, at the L-4, step VI level. His appointment was subsequently extended 14 times, until 31 March 1994, when he was separated from the Organization. At the time of his separation from service, the Applicant held an appointment at the L-6, step VII level.

In a memorandum dated 14 June 1989, the Under-Secretary-General (USG), Department of Technical Cooperation for Development, announced his approval of guidelines submitted by a department-wide panel on the Administration of Headquarters Project Personnel (the Guidelines) for the improvement and streamlining of the procedures for recruitment, appointment, extensions, reclassification and terms of reference of project personnel.

With respect to extension of appointments and retirement, the Guidelines stated, inter alia, that the extension of appointments was subject to the availability of funds and a continuing need for the area of expertise at issue. In addition, the Guidelines stipulated that all project personnel appointments carried no legal expectancy of renewal or conversion to any other type of appointment. Nevertheless, "every effort" would be made to "give

three months' notice of non-renewal" to the holders of project personnel appointments."

In a memorandum dated 22 September 1993 to the USG, Department of Administration and Management (DAM), the USG/DDSMS advised that he "intend[ed] to extend all DDSMS Series 200 staff for six months subject to programme requirements with effect from 1 January 1994." By memorandum dated 13 October 1993, the USG/DAM, replied that "it [was] prudent at [that] point in time to extend the appointments of the [200 Series technical staff] for three months through 31 March 1994" in order "not to prolong the implementation of the Secretary-General's decision to distribute some of the resources to the Regional Commissions."

In a memorandum dated 30 November 1993, from the USG/DDSMS to the Director of Personnel, Office of Human Resources Management, regarding the age limit for 200 Series personnel, the USG advised that the practice of the Department before 1991 had been that "project personnel could be appointed and ... retained in service up to the age of 70." He stated that, in October 1991, the Department had adopted the Guidelines "to ensure a fair, equitable and transparent system for the formulation of recommendations related to the appointment, extension and reclassification of 200 Series staff administered at Headquarters", which guidelines were not intended to modify the basic conditions of service of 200 Series staff under the Staff Regulations and Rules and in their letters of appointment.

On 9 February 1994, the USG/DDSMS wrote to the USG/DAM, informing the latter of the developments relating to the 200 Series staff, including the three month extension of appointments of interregional and technical advisors assigned to DDSMS Headquarters. The USG/DDSMS added that the General Assembly, by approving the 1994-1995 proposed programme budget, had confirmed the decentralization of some 200 posts to the regional commissions. As the majority of those posts were encumbered, the USG/DDSMS urged the

Administration to establish appropriate machinery for the redeployment of the posts together with their incumbents.

On 28 December 1993, the USG/DDSMS informed the Applicant that his appointment had been extended until 31 March 1994. The letter further stated that "[t]he Department [was] ... experiencing serious financial constraints and programmatic uncertainties" and, therefore, the USG "[was] unable at [that] time to provide [the Applicant] with any assurances that the necessary resources and programmatic needs [would] be there to justify the extension of [his] appointment in [the] Department any further beyond its currently scheduled expiry date."

On 21 February 1994, the Applicant requested an administrative review of this decision. On 18 March 1994, the Applicant requested a suspension of action on the decision not to extend his contract beyond 31 March 1994. On 31 March 1994, the Joint Appeals Board (JAB) adopted its report on the Applicant's request and recommended to reject it. The JAB adopted its report on the merits on 14 March 1996. Its considerations, conclusions and recommendation read, in part, as follows:

> "Considerations
>
> ...
>
> 20. The Panel first considered whether the Appellant had a legal expectancy of the renewal of his contract. The Panel noted that the Appellant was recruited under the 200 Series of the Staff Rules which applied to all project personnel appointed by the Secretary-General for service with technical assistance projects on a temporary appointment. As a rule, fixed-term appointments do not carry an expectancy of renewal, as expressly provided in staff rule 204.3(d) which stipulates that 'a temporary appointment does not carry any expectancy of renewal', as well as in the Appellant's letter of appointment that was signed by him. Nevertheless, the United Nations Administrative Tribunal has established that

this principle would not prevail if, by the conduct of the Administration, the Appellant was given a reasonable expectancy of continued employment (Judgements Nos. 285, Perucho; 298, Delano de Stuven and 319, Jekhine). Thus, the Panel had to examine whether certain circumstances of the Appellant's intermediate-term appointment and service created a legal expectancy of continued employment.

21. The Panel considered the main arguments the Appellant had raised to support his claim that he was led to believe that his contract would be renewed, ...

22. The Panel did not accept the premise that since DDSMS has active drilling projects worth several millions of dollars, the Appellant had [a] legitimate expectancy of the continuation of his [employment] with the Organization's funds. The Panel did not find any correlation between the on-going active drilling projects and the question of whether or not the Appellant himself would be given a new contract. The Appellant himself did not submit to the JAB sufficient evidence indicating that based on the availability of funds for on-going projects, he was offered a new contract.

23. The Panel examined the Appellant's contention that the decision not to renew his contract was prejudicial and was a direct result of the expression of his concern about the behaviour of DDSMS. After carefully examining the records before it, the Panel did not find any wrong-doing by the Administration nor any basis for finding that the decision not to extend the Appellant's contract had been improperly taken. The Panel felt that the decision not to renew the Appellant's contract was dictated by the financial and programmatic circumstances facing at the time the Appellant's Department, and was not based on his personal or professional merit.

...

25. The Panel was of the opinion that the Appellant's type of appointment, namely an appointment under the 200 Series, was contingent on the availability of projects and their funding. For that reason it is stipulated in staff rule 204.3 that 'Project personnel shall be granted temporary appointments'.

...

27. The Panel also considered the Appellant's contention that he had been given repeated assurances both by the Administration and by his own Department that, no matter what the scope of the financial difficulties faced by the Organization, a solution would be found to ensure his continued employment. The Panel noted that the Administration tried to find ways in helping the Appellant to continue his service with the Organization. The Panel, however, did not find any evidence that the Appellant had been actually offered an extension of his contract or that he had been given any binding commitment. The Panel felt, however, that the assurances given by the Department allowed room for ambiguous interpretation, which apparently misled the Appellant.

Conclusions and recommendation

28. The Panel concluded that the decision not to renew the Appellant's contract did not violate his rights, including his right to due process.

29. The Panel also concluded that under the terms and conditions of the Appellant's employment, he had no right to the renewal of his appointment nor had the Organization led him to have a reasonable expectancy of continued employment.

30. Accordingly, the Panel recommends that the appeal be rejected."

On 15 March 1996, the USG/DAM transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has noted the Panel's conclusions that the decision not to renew your contract did not violate your rights, including your right to due process; and, that under the terms and conditions of your employment, you had no right to the renewal of your appointment nor had the Organization led you to have a reasonable expectancy of continued employment. The Secretary-General is in agreement with the Panel and has decided, accordingly, to maintain the contested decision and to take no further action on your case."

On 6 May 1996, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. Given his employment history with the Organization, the Applicant had a reasonable expectation of continued employment until he reached 60. The decision to separate him violates accepted moral and labour standards worldwide, and was arbitrary and discriminatory.

2. The Applicant should be given a termination indemnity because he was involuntarily separated from the Organization. He also is entitled to the payment of his salary from the date of his separation until his 60th birthday.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither any right to, nor the legal expectancy of, continued employment with the Organization.

2. Pursuant to Annex III to the Staff Regulations and to the Applicant's Letter of Appointment, the Applicant is not entitled to any termination indemnity.

The Tribunal, having deliberated from 8 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant was recruited in 1973, under the 200 Series of the Staff Rules and served on a series of extensions of his appointment until 31 March 1994. The Applicant's claim results from the non-extension of his appointment after that date, due to a reorganization of resources and the assignment of more development projects to UNDP/OPS at the expense of the United Nations Department

for Development Support and Management Services (DDSMS). According to the Applicant, in view of his long and uninterrupted service, he had an expectancy of continued employment.

II. The Tribunal examined whether, given the circumstances of the case, the Applicant was justified in his expectancy of continued employment with the Organization until the age of 60.

III. The Applicant bases his expectation on what he sees as the Organization's "moral obligation" to maintain him in service. He refers, in this context, to the expressed position of the Administration, that the United Nations, as a good employer, has a moral commitment towards all its staff, taking into account their length of service and other human considerations. The Applicant argues that he had, in fact, become a permanent staff member. This, he asserts, was evidenced by the fact that when the letters of appointment renewing his contract were delayed, he continued to be paid his salary during these gaps, despite the absence of a contract.

IV. While the Tribunal sympathizes with the Applicant's argument that there was a moral obligation on the Organization to maintain him in its employment and, indeed, in purely human terms, that he had an expectation of continued employment until age 60, it finds that this expectation did not impose a legal obligation on the Organization.

V. Staff rule 204.3(a) provides that "temporary appointments shall be for a fixed-term and shall expire without notice on the date specified in the respective letters of appointment." Staff rule 204.3(d) provides that "a temporary appointment does not carry

any expectancy of renewal." These rules govern the Applicant's employment with the Organization, and are clearly incompatible with the Applicant's claim. To overcome these provisions, the Applicant would have to demonstrate either arbitrariness or discrimination on the part of the Administration.

VI. The Tribunal notes that the Respondent was negligent in the past, in failing to present the Applicant with timely renewals of his employment contracts. The contracts were then renewed retroactively. There was no interruption in payment. This conduct may have given the Applicant the mistaken impression that the absence of a contract during the intervening period did not affect his status, which he believed to be equivalent to that of a permanent staff member.

However, on this occasion, the Under-Secretary-General, DDSMS, informed the Applicant by letter of 28 December 1993, that his appointment had been extended until March 31, 1994. The letter further stated that "[t]he Department [was] ... experiencing serious financial constraints and programmatic uncertainties" and, therefore, the Under-Secretary-General "[was] unable at [that] time to provide [the Applicant] with any assurances that the necessary resources and programmatic needs [would] be there to justify the extension of [his] appointment in [the] Department any further beyond its currently scheduled expiry date."

Effective 1 January 1994, the Applicant's appointment was extended for three months. On 31 March 1994, his appointment expired and he was separated from service.

VII. The Tribunal has also considered the treatment of staff members engaged under different series of the Staff Rules. The Applicant, in accepting appointment under a specific series, was

aware of the conditions of his appointment. He cannot, therefore, argue that it was only after his appointment had commenced that his position became disadvantageous vis-a-vis that of a staff member appointed under a different series. Accordingly, an argument based on discrimination must fail. The Respondent, in dealing with the Applicant as he did, was doing no more than applying the relevant rules.

VIII. The Tribunal finds that the position is the same in relation to the Applicant's claim that, because his separation was involuntary, he was entitled to a termination indemnity. The provisions of Annex III of the Staff Regulations are clear, i.e., "(d) No indemnity payments shall be made to ... A staff member who has a temporary appointment for a fixed term that is completed on the expiration date specified in the letter of appointment." Hence, the Applicant is not entitled to a termination indemnity.

IX. However, the Tribunal notes that the Joint Appeals Board, in its report, stated that "the assurances given by the Department [with regard to the Applicant's further employment] allowed room for ambiguous interpretation which apparently misled the [Applicant]." This confusion, coupled with the Applicant's erroneous assumptions concerning his status, must be considered as having adversely affected his alternate plans for employment resulting in possible loss. For this, he is entitled to compensation, which the Tribunal assesses at six months of his net base salary on the date of his separation from service.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant six months of the Applicant's net base salary at the rate in effect on the date of his separation from service.

All other pleas are rejected.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

Geneva, 1 August 1997

R. María VICIEN-MILBURN
Executive Secretary